LETTERS

ON

SPECIAL PLEADING,

BEING AN

INTRODUCTION TO THE STUDY

OF THAT

BRANCH OF THE LAW.

Second Edition,

REVISED AND ENLARGED.

BY

JOSEPH PHILIPS, ESQ., M.A.

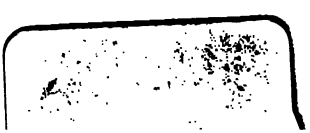
OF THE INNER TEMPLE, SPECIAL PLEADER.

LONDON:

BENNING & CO., LAW BOOKSELLERS,

43, FLEET STREET.

1850.



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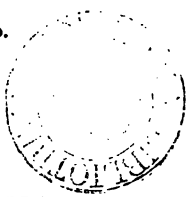

BY

JOSEPH PHILIPS, ESQ., M.A.,

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RAYNER AND HODGES, PRINTERS,
109, Fetter Lane, Fleet Street.

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TO THE SECOND EDITION.

In the present Edition, the Author, besides carefully revising the original one, has given additional matter where it seemed to be required without going beyond the scope and object explained in the former Preface, of a purely introductory essay, or first book for students of special pleading; it may be repeated here, that the Letters are designed to be read consecutively in the order in which they are written.

PREFACE

TO THE FIRST EDITION.

It is well known that the great majority of Common Law Students who enter at the Inns of Court, with a view of preparing for the Bar,—many of them fresh from the Universities, on commencing their studies in London know next to nothing about Law, and literally nothing about Special Pleading or the general business of the Pleader. In this state they enter chambers; and here the pupil undertakes his first case, has the range of the Library, and also the instruction and assistance of the pleader so far as he has time to give it.

The newness of the scene, the collection before him—books of Precedents, works on Pleading, on Contracts, on Torts or Wrongs, and again even large volumes on divisions merely and subdivisions of

these subjects,—the Reports, the Statutes,—all together tend to throw him into almost hopeless perplexity. He asks many questions, there are many others that he would like to ask, and which perhaps would only do him credit if he did ask, and yet he does not, partly from a fear of being thought wanting in apprehension, and partly from a desire not to occupy too much time with such inquiries; and the danger now is that his hesitation will turn into disgust or a settled indifference that may not afterwards be very easily overcome. I therefore think that a few Letters of a popular and easy character relating to the business of a Special Pleader, with a few illustrations, will not be unacceptable to those who are about to become Students at Law, and as yet know nothing of law; and I should wish by this means to convey to them some general notion of the subject, that both may in itself be useful, and may also enable them to see a little beyond the mist and confusion that they must encounter at the outset of their career. I do not pretend that within so small a compass, and in such a form, much knowledge of Law can be conveyed, but I think that by a slight sketch of the kind I propose, those for whom it is intended may be led to perceive that the task they have chosen is not by any means one of overwhelming difficulty, and that the mere technicalities being surmounted by some patience and industry, they have only before

them a very pleasant exercise for the intellect, and a course of reading and balancing of opinion, which independently of its being blended with their future prospects, is about to be of great service to them in improving and strengthening their understanding and judgment.

I should wish the Reader to take the following Letters consecutively in the order in which they are written.

J. PHILIPS.

1, *Mitre Court, Temple.*

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TO

CASES AND STATUTES CITED.

LETTER I.

Duties of a Special Pleader.

A SPECIAL Pleader, so called from his being employed to prepare the written pleadings in suits at law for one of the litigant parties, answers to the common idea of a chamber counsel. He is one of that class; and besides being engaged in drawing the written pleadings either for the complainant or the defendant in a suit at law, he advises parties on cases submitted by their attorneys to him for his opinion. On a state of facts prepared by the attorney on consultation with his client, the pleader gives his impartial opinion, which is acted on or not at the discretion of those who seek it. The cases that in one shape or another come before the pleader embrace a very wide, perhaps the widest range of those civil differences that can become the subject of litigation in this country. To enumerate these would be impossible; but if you call to mind the complaints and differences that appear from the newspapers to be the subject of trials by jury at the Sittings in London and Middlesex, and at the Spring and Summer Assizes throughout the country,

and also of legal arguments in the Courts of Common Law at Westminster during Term time, you may form some idea of their extent and variety. The pleader then gives his opinion on cases, and is also engaged in actions at law, whether they be commenced with or without an opinion, in drawing or assisting to draw the written pleadings therein, and in advising and aiding on many collateral points during the progress of the suit; he may thus be said to have both a judicial and an auxiliary capacity; thus he pronounces judgment, so far as his single opinion goes, on cases submitted to him for that purpose, and also applies his skill and knowledge in aid of the party who retains him in the conduct and preparation of his side of the action previous to the trial. When an action is once commenced, it is not very usual for either party to proceed to trial without at some stage or other seeking the advice or the assistance of a special pleader. The pleader's business, indeed, relates principally to actions at law either in contemplation or in existence, and it is of the action at law and the written pleadings, and other matters involved therein, that I must endeavour to give you some general notion.

LETTER II.

Summons — Appearance — Declaration — Plea — Replication — Issue in law and in fact — Necessity of arriving at distinct issue — Origin of pleading — Modern improvements — Record — Judgment — By default — Interlocutory or final — Execution — Principal steps in action before coming to issue — Note as to action on judgment and sci. fa.

When a party, as complainant or plaintiff, sues another at law in one of the superior Courts in this country, the first step is to summons him, the defendant, to appear to answer a complaint against him. When the defendant has *appeared* (1), which he does by means of a formal entry, in writing, in the offices of the Court, and which, in effect, admits that he has had sufficient intimation of the suit to put him on his defence against the complaint about to be made against him,—the next step is

(1) To enter into a description of the technicalities incident to a writ of summons, and the modes of compelling an appearance, would not be within the object of this work. An excellent account of the appearance, historical and explanatory, is given in the 70th page of the 1st Report of the Commissioners on Courts of Common Law.

for the plaintiff to *declare*, or state in writing, what the complaint is. To this declaration the defendant makes answer or pleads. To his *plea* the plaintiff replies, and they thus proceed by alternate statements, in writing, until they come to some point of dispute, some issue, that must be decided for them. It is at this point that open trial in Court takes place.

It is when clear points of difference between the parties have been arrived at by means of pleading in writing, that it becomes necessary that an open trial shall take place, either on legal arguments addressed to the Judges alone sitting *in Banc* (1) at Westminster in their respective Courts, to hear and determine questions of law, or on trial by jury under the presidency of one of the learned Judges.

I dare say you may know that when an action at

(1) "In banco," bancus, here means the "seat of judgment." There are five Judges in each of the superior Courts of Common Law, Queen's Bench, Exchequer of Pleas, and the Common Pleas; there being four Puisne (*a*) Judges, and one Chief in each; and under the provisions of 1 Wm. 4, c. 70, s. 1, only three of the Puisne Judges with the chief, or four of them in his absence can sit at the same time in banc during Term. The object of having the number four, being that no point of law shall be decided on solemn argument before the Court in banc, without having at least a majority of three of the learned Judges to one.

(*a*) Puis-ne, second in rank to the chief, literally, "born after" "younger."

law is brought, some time elapses between the commencement of litigation and the trial of the cause, but you may have been under the idea that this interval is merely delay until the particular cause is taken in its turn. There is no doubt some delay of that nature; but a great part of the interval between the first note of war and the contest in open Court, is always occupied by the parties themselves in coming to issue; and it is only on issues joined, either issues of law to be argued before the Court in banc, or issues of fact to be tried by a jury at Nisi Prius (1) under the direction of a Judge, that the formal and open trial in Court takes place.

I may just mention that the Court in banc hears and determines many points of law besides *issues* in law, which issues in law are pure disputes raised by the written pleadings as to the legal right of the parties, as they appear on the face of the written pleadings alone.

For instance, if the Judge presiding at a Nisi Prius trial has allowed evidence to go to the jury which is not correctly admissible, or has misdirected them as to what they are to assume the law to be in dealing with the facts, that may be made ground

(1) "Nisi Prius" in the *forms* still used after issue joined, relative to the award of writs to summon the jury, a sort of harmless tribute to antiquity is paid, by preserving the old notion that the cause will be tried at Westminster, "unless first" (Nisi Prius) her Majesty's Justices come before such a day to such a place, &c.

for an application for a new trial, which application is heard and determined on argument before the Court in banc.

But to return to the pleadings and issues thereon, when I say that, after the commencement of the suit, an interval is occupied by the parties themselves in coming to issue, I do not mean that they are left without control to arrange the points of difference between themselves; if they were, there would be but few instances in which specific issues would be arrived at by parties in so hostile a situation as the plaintiff and the defendant in a suit at law. On the contrary, they *are* under control, both as to the time and the manner of their allegations, and are compelled by the system that prevails in our Courts of law *so* to plead that they must sooner or later arrive at specific issues. Both the *manner* of their allegations and the *time* within which they are to make them are regulated by law, and the practice of the Courts, and they must proceed in their alternate statements by certain formal stages under the cognizance and control of the Court in which the action is brought. The plaintiff must, after the appearance of the defendant is entered, declare his complaint. To this declaration of the plaintiff, the defendant must, within a certain time, unless he means to let judgment go against him by default, plead. To this pleading the plaintiff replies, or if he hesitates, may be ordered to do so by rule of Court, and so the parties proceed in point of *time*. Neither is the *manner* of their allegations uncon-

trolled; here steps in the science of special pleading, which is part of the law, and by the rules of which the parties are constrained to limit and point their allegations in such a way that sooner or later they arrive inevitably at specific issues either of fact or of law, at distinct points of dispute whereon the cause may be properly decided.

You must admit that a science or system capable of producing such an effect must be a remarkable one. It is a scheme of rules which have almost a magical result, in forcing the hostile parties in a suit at law through a succession of moves which lead them in spite of themselves to clear points of difference upon which the cause may be properly tried and determined.

This system of special pleading is of very ancient origin, and Mr. Serjeant Stephen (1) states that "the manner of allegations in our Courts may be said to have been first methodically formed, and cultivated as a science in the reign of Edward the First; from this time the Judges began systematically to prescribe and enforce certain *rules of statement*, of which some had been established at periods considerably more remote, and others apparently were then from time to time first introduced. None of them seem to have been of legislative enactment, or to have had any authority, except usage or judicial regulation; but from the general

(1) Stephen on the Principles of Pleading, p. 135, 5th edition.

perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected *system of pleading.*"

This progressive advance of the science of special pleading has been extended into very recent times, when most important improvements have been effected in it, so that it may be said to have nearly reached perfection.

These improvements, as well as many others, connected with the administration of justice in civil actions, were, for the most part, founded on the recommendation of the learned Commissioners appointed in 1828, to inquire into that department of the law, in their Reports on the Courts of Common Law. The proposed alterations as to pleadings were principally settled and determined by the Judges in accordance with the provisions of 3 & 4 Wm. 4, c. 42, s. 1, by certain rules now well known in the Profession by the name of the New Rules, which besides making, in pursuance of the Act, alterations and amendments as to pleadings and entries of pleadings, extend to certain matters of practice which each Court has an inherent power of regulating for itself.

To return to the course of the action; the written pleadings in the cause are the permanent written statements of the parties from which the (1) record

(1) Record from "recordari" "a record is a memorial of a proceeding or act of a Court of Record, entered in a

of the Court is made up, and on which after the issues in fact or the issues in law, or both arising thereon, have been tried, the final judgment of the Court is obtained.

What I have said as to alternate pleadings, relates of course, to cases where the defendant pleads; if after he has been compelled to appear to the writ of summons, and has had notice of the plaintiff's declaration against him, he does not make any answer thereto, within a certain time, judgment goes against him by default; the plaintiff being entitled to it, as of course. Sometimes this judgment is interlocutory only, in others final, for a specific amount in the first instance. It is interlocutory where, from the nature of the complaint, or the form of action adopted, it is necessary that damages should be assessed by a jury under a writ of inquiry. The defendant having made no answer to the plaintiff's declaration, and it being in a form of action in which it is necessary for a jury to assess the damage, the interlocutory judgment amounts to this, that he recovers his damages on occasion of the premises, but because the Court does not know what they are, a writ of inquiry (1) must go, directing the sheriff to summon a jury, to inquire as to

roll of parchment for the preservation of it." Co. L. 117 *b.* 260 *a.*; Com. Dig. Tit. Record (A.)

"Pleadings were anciently pronounced by counsel *ore tenus*, and minuted down by the *prothonotaries*, and afterwards entered of record in the Latin language." Com. Dig. Plead. Tit. (A.)

(1) See generally Tidd's New Practice, page 292.

such damage, and return the inquisition (1); and this inquisition having been made by the sheriff, he returns it to the Court, and the plaintiff is entitled to final judgment for the damages assessed.

In the same way as in the case of judgment by default, so where the action turns wholly upon an issue at law, the Court having given judgment in favour of the plaintiff, if the action is such that a jury must assess the damages, judgment is interlocutory, and the writ of inquiry is necessary; and the final judgment follows on the return of the inquisition. At the trials at the Assizes, you have probably observed, that the jury both decide aye or no on the issues before them, and also at the same time assess the damages.

When final judgment is at last entered up for the successful party for the amount recovered, execution may issue for the amount of such judgment.

This execution is termed final process, in contradistinction to mesne or intermediate process, by which an action is commenced.

(1) The object of the inquisition is to inform the conscience of the Court, and it is in the discretion of the Court to direct the Master, one of the officers of the Court, to make an inquiry, and this is done by a "rule to compute;" but it is the practice of the Court to grant such a rule only in certain cases where the question is a mere matter of calculation. For instance, the principal and interest on a bill of exchange or promissory note, where judgment has gone by default in an action of promises thereon. See 1 Chitty's Archbold, 8th edit., p. 887, and see a late case on the subject, *Smith* v. *Nesbitt*, 1 Dowl. & Lowndes, 420.

I will here mention to you the principal steps in an action before the parties come to issue.

The Writ of Summons, which is served on the defendant to bring him into Court.

The Appearance of the defendant entered at the proper office.

The Declaration, in which the plaintiff, after the defendant has appeared, states his cause or causes of action under one or more distinct heads called counts.

The Plea or Pleas, by which the defendant gives his answer to the plaintiff's declaration.

The Replication, by which the plaintiff replies to such answers, and at this point the cause may be first brought to an issue in fact.

If, however, the pleading proceed, the next step is the Rejoinder;

Which may be met by a Surrejoinder, beyond which the pleadings may go to a Rebutter and Surrebutter, and even still further, but this is very unusual.

A Demurrer, may be made use of by either party at any step subsequent to the declaration, in the place of any of the pleadings above mentioned, and it is the mode in which one party objects that the precedent pleading of his adversary is on the face of it insufficient, and this leads to an issue in law.

It may be mentioned here that there is an issue in fact, which is tried by the Court itself without the assistance of a jury; *viz.* the peculiar issue

on a plea of *nul tiel* record which solely turns on the question whether there is a particular record of the superior Court. For instance, in an action of debt on a judgment of one of the superior Courts, it may be pleaded that there is no such record—*nul tiel* record as in the declaration alleged, and this would be a matter of fact for the Court itself to investigate (1).

(1) It may seem singular that the *same plaintiff*, who has already recovered final judgment, on which as is before stated execution might have issued, should ever bring a second action against the *same defendant on the judgment;* but after the lapse of a year the power of issuing execution ceases until the judgment is revived by a process called *scire facias*, or until a second judgment is obtained in respect of the duty or legal obligation to pay arising out of the first one. The writ, by means of a fresh action thereon of *scire facias* on a judgment after a year has elapsed, is founded in personal actions on the Statute of Westminster 2nd, 13 Edw. 1, st. 1, c. 45, and is a writ directed to the sheriff commanding him, according to the statute that he "give knowledge" "*scire facias*" "to the party complained of, that he be afore the justices at a certain day, to shew if he have anything to say" why execution should not issue.

The abuse of the right of bringing a fresh *action* on the judgment is in a great measure prevented by 43 Geo. 3, c. 46, s. 11, which deprives the plaintiff in such action of any costs of suit, "unless the Court in which such action on the judgment shall be brought, or some Judge of the same Court shall otherwise order."

"Pleadings follow upon a *scire facias* where the defendant has any defence to offer against execution issuing."

"Costs on *scire facias* are regulated by stat. 8 & 9 Wm. 3, c. 11, s. 3, and 3 & 4 Wm. 4, c. 42, s. 34; see also Reg. Gen. Hilary Term, 2 Wm. 4, r. 78."

LETTER III.

Advantages of Pleading—Exemplified by a case put of an action on a bill of exchange by the indorsee and holder thereof against the drawer—Necessary explanation of the rights and liabilities of the parties—Analysis of the declaration in the action—Plea thereto—Issue joined.

Opinion of Mr. Serjeant Stephen as to the superiority of the English mode of developing the points for decision in a cause, over that which prevails, in other judicatures—Note as to objections brought against the system of pleading.

But you may ask why, after all, should there be any written pleadings in an action before the case is tried? We hear trials at the assizes, the counsel for each party makes a speech, and generally a long one, witnesses are called, and examined at length, the Judge sums up and explains, and the jury give their verdict. Is not this enough without putting the parties to the expense of preparing written pleadings, one against the other, before they come into Court? To this I answer, the counsel's speech would be longer, the

witnesses more numerous, the duties of the learned Judge more burthensome and difficult, and the trouble and expense of the parties infinitely increased, if they were not compelled by the system of pleading as it prevails in our law, to shape their issues before coming to trial—to state their counter-allegations, accurately and logically on paper—to shew the claim, the answer thereto and the reply to that, and so proceed till they arrive at some one fact, or several distinct facts, affirmed on the one side and denied on the other, in which a simple decision of aye or no is all that is required. Moreover, as the written pleadings proceed, the cause sometimes resolves itself into a pure question of law, on the face of the pleadings, and is then referred solely to the Court in banc, and thus the expense of a trial by jury, involving that great expense of a lawsuit, the bringing forward the witnesses, is entirely saved, because the parties by means of this system of special pleading have discovered that they can agree upon the facts, and differ only on some point of law. Let me illustrate the advantage of arriving at issues in fact (I will speak of an issue in law in my next Letter) by referring to an action on an ordinary bill of exchange made on good consideration and payable to order. I must, to render what I say intelligible, travel into a short explanation of the legal nature of such an instrument, though you must understand, once for all, that on any subject thus touched upon, I cannot attempt, within these limits and keeping

in view the object of the work, to do more than give you some general idea which may pave the way for your own researches, when law books are put into your hands. A bill of exchange then, payable to order, is a written order drawn by one party on another, whereby the drawee, *i. e.* the party on whom the bill is drawn, is required by the drawer to pay to his order, or, if the case be so, to the order of some third party named in the body of the bill, a certain sum of money at a certain time. Such a bill of exchange is a negotiable instrument; that is, it may be transferred from hand to hand by successive orders called indorsements (1), so as to confer upon the holder, for the time being, a right of action on the bill, against any of those parties who have, previously to its coming into his hands, pledged their credit in the way usual on such an instrument for its due payment at maturity. Such right of action being inchoate whilst the bill is running, and complete when the bill is mature and dishonoured (2).

Suppose such a bill drawn by A. on B. for good

(1) An indorsement is most usually effected by the indorser, that is, the party who indorses, simply writing his name on the back of the bill and handing it over, so indorsed, to the party to whom he intends to transfer it, who is then called the indorsee. This is called an indorsement in blank, but it may be done more specially, as by writing in full, pay Mr. C. (the transferee) or order.

(2) As to notice of dishonour to the party to be charged, see *infra*.

consideration, payable to A.'s own order; B. accepts the bill by writing his acceptance across it, and delivering it back to the drawer A., and thereby promises to pay the said bill when due, according to its tenor and effect, and B. the acceptor is the party primarily and absolutely liable on the bill. This bill being an exception to a general, and anciently a very strict rule of the common law, intended to discourage litigation, viz. that a right of action—or as it is termed a chose in action—shall not be assigned over from party to party; being an allowed exception to this rule, is assignable (1), and A., the drawer, may transfer it by indorsement to C., so as to give C. a right of action on the bill in his own name; and C. may in the same way transfer it to another, and so on through any number of parties. Now the legal situation of the parties to such a bill is this—the acceptor is primarily and absolutely liable, the others only conditionally so. The acceptor promises to pay at all events, but the drawer and indorser respectively promise to pay only if the acceptor does not when the bill is presented to him at maturity for payment, and they have due notice (2) of such dishonour.

(1) A promissory note, payable to order, is also assignable. This is by reason of the stat. of Anne, 3 & 4 Anne, c. 9; that statute, "with the intent to encourage trade and commerce," put promissory notes on the footing of bills of exchange, which are transferable by the law merchant.

(2) There are a great many cases in the books as to what

In order therefore to give the holder a complete right of action against the drawer who had indorsed it over, or against any other party whose name is on the back of the bill, and who has indorsed it previously to its coming to the holder, he the holder must be in a condition to make out against the drawer or other indorser sought to be charged, that the bill was dishonoured on presentment to the acceptor, and that due notice was given.

Suppose then that on the bill of exchange above described, C., the holder, commences his action at law against A., the drawer, who indorsed it to him, C. the indorsee and holder being the plaintiff, and A. the drawer and indorser being the defendant—the plaintiff C., by our system of special pleading, is obliged when he comes to *declare*, to shew on the face of his declaration a state of facts which will, *if* unanswered, entitle him to recover the amount of the bill from the defendant A.; but A.'s promise as drawer and indorser is, as we have seen, a conditional one only. C. the plaintiff therefore has to shew on the face of his declaration, that every event has occurred on which A. the defendant's liability was conditioned. He the plaintiff therefore must, besides certain matters of form, have at least five substantive material allegations in his declaration on the bill.

is sufficient notice of dishonour; all the previous ones are reviewed in the judgment of the Court of Queen's Bench by Lord Denman, in *Furze* v. *Sharwood*, 2 Q. B., see p. 409.

1. That the defendant drew the bill on B. (describing it, and adding that the period of payment has elapsed).

2. That the defendant indorsed it to the plaintiff.

3. That it was presented to B. for payment on the day when it became due.

4. That B. nevertheless did not pay it.

5. That A. had due notice of such dishonour.

Then follows in the declaration the plain legal inference from the above facts, that A. became liable to C. to pay to him the amount of the said bill forthwith, and yet it is added he hath not done so.

Here then there is a good declaration, a complete statement against the defendant, which if unanswered, will entitle C. to recover from him the amount of the bill. Now without going into any other defences to such a claim, whether by way of subsequent discharge or otherwise, it is sufficient for the purpose of the illustration aimed at, to point out, that if any one of the five material allegations in the plaintiff's declaration be *disproved*, his whole claim falls to the ground. If A. never drew such a bill, he is not liable; if he never indorsed it, he is not liable; if it was not presented to the acceptor, he is not liable; if the acceptor paid it when presented, he is not liable; if when the bill was dishonoured due notice was not given him, he is not liable. And we find then this advantage in the system of pleading previous to the trial, viz. that the defendant need not put the plaintiff to be prepared with proof of *all*

his material allegations but may select out of them the true point of his defence, join issue on it with the plaintiff, and go to trial on that alone. Were there no such previous pleadings, the plaintiff must go into Court *prepared* to prove all his material allegations, thus both increasing the expense of the action to whomsoever might ultimately have to bear it, and leaving it to be discovered at the trial, after some trouble, either by the Judge, or the counsel for the opposing parties, that the defendant was willing to admit the truth of four (1) out of the five material points above mentioned, and to stake his defence on the denial of one of them only; for instance, that he the defendant had not due notice of the dishonour of the bill.

Reverting then to the declaration on the bill, and supposing the defendant to set up the defence last mentioned, and no other, his plea would be simply as follows:—

> The defendant by —— his attorney saith, that he the defendant *had not* due notice of the non-payment of the said bill of exchange in the said declaration mentioned, in manner and form as the plaintiff hath above in his said declaration alleged, and of this the defendant puts himself upon the country, &c. (*i. e.* offers to try by jury.)

(1) Or fewer, as the case might be.

To which the plaintiff would reply:

> The plaintiff as to the plea of the defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like (*i. e.* he accepts the offer to try by jury).

Issue in fact is now joined between the plaintiff and the defendant,—the Nisi Prius record which contains a transcript of the pleadings is made up,—it is put into the hands of the presiding Judge, and the only question for the jury at the trial is, had or had not the defendant due notice of the dishonour of this bill.

If you can see the advantage in the simple case put, of the parties coming to issue by means of special pleading, previously to the trial, you may imagine what trouble and confusion it prevents in those of a more difficult or intricate nature (1). I

(1) Notwithstanding, however, the excellency of this system, it cannot but occasionally fail in its object, and instances will occur of individual hardship, where parties have mistaken the mode of pleading, suited to the facts on which they rely; but these, when we consider the mass of litigation got through in this country, are comparatively of rare occurrence, and the opportunities of amending (*a*), and that too after demurrer, lessen both their frequency and importance; and in no branch of English jurisprudence

(*a*) See also as to amendment of variances at the trial, 9 Geo. 4, c. 15, and 3 & 4 Wm. 4, c. 42, s. 23.

will now conclude with a quotation from a work which I have already referred to, and which is distinguished by extraordinary learning and unrivalled clearness on the subject it treats of. The passage I am about to quote is from Mr. Serjeant Stephen's work *On the Principles of Pleading in Civil Actions*, and contrasts the superiority of our system of coming to issue by special pleading, over that which obtains

does the general good produced more outweigh the occasional instances of failure than in that of special pleading. No system whatever, or branch of a system, for the regulation and decision of the various and almost numberless disputes and differences which are made the subject of litigation can, however perfect in itself, be faultlessly carried out in practice; and it is no great thing to say, that without special pleading, the errors and oversights in the preparation, conduct, and trial of actions, would be far more numerous than they are at present, though perhaps they might be more likely to escape detection, and be felt only in their results. Besides, examine with the same view any other branch of the law. Let those, whose opportunities permit them, contrast the occasional mischances of special pleading with the ill effects that the law of evidence, with its rules of exclusive operation, sometimes has on the real merits of an action; I mean where that law is perfectly understood and correctly applied, and to these must also be added the not infrequent disasters which result from its not being perfectly understood, or being incorrectly applied, and which must continue to occur so long as human judgment is fallible. And yet people almost venerate the law of evidence as administered in this country. These remarks on the merits of the system of special pleading, will not be considered inappropriate here, inasmuch as the utility of the system, and the expediency of maintaining it, have lately been much called into question.

in other judicatures (1). "By the general course of all other judicatures, the parties are allowed to make their statements *at large* (as it may be called), and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary, before the Court can proceed to *decision*, to review, collate, and consider the opposed effect of the different statements, when completed on either side,—to distinguish and extract the points mutually admitted, and those which, though disputed, are immaterial to the cause,—and thus by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most Courts, privately made by each of the parties for himself, as a necessary medium to the preparation and adjustment of his *proofs;* and is also afterwards virtually effected by the Judge in the discharge of his general duty of *decision;* while, in some other styles of proceeding, the course is different, the point for decision being selected from the pleadings by an act of the Court, or its officer, and judicially promulgated prior to the proof or trial. The common law of England differs, it will be observed, from both methods, by obliging the parties to come to an issue; that is, so to plead, as to develope some question (or issue), *by the effect of their own allegations*, and to *agree upon this question as the point for decision* in the cause, rendering un-

(1) Stephen on the Principles of Pleading, 5th edition, p. 137.

necessary any retrospective operation on the pleadings, for the purpose of ascertaining the matter in controversy."

I may as well mention at the close of this Letter that a defendant is not restricted to the use of one plea or ground of defence to each matter of complaint; by the ancient common law he was so restricted, but by the statute of 4 Anne, c. 16, s. 4, it was enacted, that by (1) *leave of the Court* a defendant may plead as many several matters as he shall think necessary for his defence.

But he must do so by means of separate and distinct pleas, and must not combine in one plea two or more matters of defence. Several pleas of course lead to several issues in fact or in law.

There can be but one replication to each plea.

(1) Applications for leave to plead several matters (specifying them) time to plead, &c. &c., during the progress of the cause, are usually made to a Judge sitting at Chambers for the purpose of disposing of applications of that nature.

LETTER IV.

Issue in law—Demurrer, general or special—Marginal note—Frivolous demurrer—Effect of substantive defects in pleadings—As to the determination of the action by demurrer—Demurrer to part of pleadings.

NEXT as to an issue in law. An issue in law is where one party objects by that form of pleading called "a demurrer" to the sufficiency of his opponent's statement. This may occur at an early or late stage of the pleadings. The defendant thus may,—if he sees ground for it,—demur to the plaintiff's declaration, or the parties may proceed for some distance in the suit, with their counterstatements of facts, and then one of them objects by (1) *demurrer* that the precedent pleading of his adversary is bad upon the face of it, and they refer to the Court on a pure question of law. The plaintiff may have his declaration, the defendant his answer thereto,—the plaintiff again his reply,—the defendant his rejoinder, to which the plaintiff surrejoins when the defendant comes in with a de-

(1) "Demurrer" from "Demorari."

murrer to the surrejoinder. And we may suppose him to demur either because the plaintiff's last statement amounts to nothing and is no answer to his the defendant's previous one, or because it violates some formal rule of pleading, so that the defendant can say to his opponent your last pleading is so improper and informal in certain respects, which I now point out, that I have no occasion to deny it or answer it with any other facts but demur.

"A demurrer has been defined to be a declaration that the party demurring 'will go no further,' because his opponent has not shewn sufficient matter against him." *Leaves* v. *Barnard*, M. T. 1694, K. B., 5 Mod. 132, Petersdorff's Abridgment, vol. 8, p. 3.

Of demurrer, then, there are two kinds, general and special, — the terms almost explain themselves,—the general demurrer being that which objects generally that the antecedent pleading is not sufficient in law, without saying in the body of the demurrer *why* it is so,—the special demurrer, on the other hand, specifying in the body of the demurrer the particular grounds of objection,—special, because it specifies. General demurrer is sufficient where the objection is of substance, special demurrer is necessary where the objection is of form. This was rendered necessary by express enactments, the 27 Eliz. c. 5, and the 4 & 5 Ann. c. 16, their object being, that a party in a civil action should not be permitted to lie by in the first in-

stance as to defects in matters of form, and afterwards take advantage of them, but should either raise such objections at once, by special demurrer, specifying and setting them down with particularity, or forego them altogether. Though the distinction between general and special demurrer is thus a marked one, still in practice they are very much blended together,—for if the pleader sees a defect in his opponent's pleading, which he thinks it advisable to object to by demurrer, it may be such a defect that it is not very safe for him to decide whether it amounts to a defect of substance, or only of form,—in order therefore to make sure he throws his objection (or objections) into the form of a special demurrer, so that if it should, on argument, be considered by the Court in banc to be one of form, he will still have the benefit of it, having set it down with particularity in the body of his special demurrer.

When a party has *demurred* to his opponent's pleading, there is no more to be said but to join in demurrer, to join issue in law; unless, indeed, the party whose pleading is demurred to will admit that he is wrong, and apply for leave to amend, which is generally allowed on terms, if applied for in proper time. Assuming the demurrer to be good, and that therefore there *is* an error in the pleading demurred to, if this error has arisen from oversight or mistake, it is proper to apply for leave to amend; but if the defect be in the party's *case*, it is of very little use to amend the *pleadings*.

I should here mention, that among others, as to the manner of delivering demurrers, demanding joinder therein, and making up the demurrer (1) books, there is one of the New Rules of a very salutary description, as follows:—"In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment, as for want of a plea" (2).

You may think that in the case of a *special* demurrer, specifying the grounds of demurrer in the body thereof, that such a marginal note is superfluous; experience however shews that is a very proper and useful rule that directs that some matter of law intended to be argued shall be prominently stated in the margin of *every* demurrer, in order that it may be more readily ascertained whether the demurrer ought to stand for argument or not. It is true that it has been held *sufficient* for this marginal note to a *special* demurrer to include by relation the points of the demurrer, by saying "the causes of demurrer are those specially assigned in

(1) The demurrer book is a transcript of the demurrer, and the whole previous pleadings to which it relates, and copies of it, are to be delivered to the Judges. See more particularly the practice as to this, Chitty's Archbold's Prac. vol. 2, p. 830, 8th edit.

(2) See Rule, Hil. T. 4 Wm. 4; Jervis's New Rules, 105.

the body of the demurrer itself;" see *Lindus* v. *Pound*, 2 Mees. & Wels. 240, but the practice is to state concisely one or two of the strongest points in the margin of the special demurrer, and it is almost to be regretted that a (1) mere reference to the demurrer itself, should in any case be held a sufficient compliance with the rule in question—the attempt at compression is of itself often valuable, as affording a quicker insight into the real merits of the demurrer. This marginal note must specify or refer to at least some one arguable objection contained in the demurrer; and the demurrer will not be set aside as frivolous on motion to the Court or application to a Judge at Chambers, if it contains any *arguable* point. In *Papineau* v. *King* (2), 2 Dowling's New Series, p. 228, Mr. Baron Alderson said, "Unless the pleading is obviously frivolous, or is pleaded in direct opposition to some decided case, we ought not to entertain these applications, because the effect of setting aside a

(1) The following form of marginal note is suggested in Pearson's Precedents, (Chitty, Jun.) "The causes of demurrer are more fully stated within some of which are," &c., (*stating one or two of them concisely*).

(2) The Court in that case refused to set aside the demurrer as frivolous; though the late Lord Abinger, then Chief Baron of the Exchequer, entertained a very strong opinion that it ought to be set aside, and he made this remark—"In my opinion this case will furnish good ground for our never granting a rule of this kind. It is difficult to suppose any point which the ingenuity of counsel may not render susceptible of argument." 2 D. N. S. 228.

pleading as frivolous is to deprive the opposite party of his writ of error." And Mr. Justice WIGHTMAN, in a case subsequent to the above, *Naters* v. *Sutton*, 10 Jurist, p. 618, said, "No doubt the object of the rule was to give the Judge some discretion as to what is, or what is not, frivolous; but the sound exercise of that discretion is matter of very great difficulty. He certainly ought not to set aside a demurrer, and deprive the party demurring of his writ of error, unless he is fully persuaded that there cannot be a fair *bonâ fide* debate upon the matter. I may entertain a very strong opinion of the merits of this demurrer, but I cannot pronounce it so obviously frivolous as to justify me in overruling it in this summary way."

It would appear, however, from a recent case that when a Judge at Chambers has once set aside a demurrer as frivolous, the full Court will not interfere with the order of the Judge on light grounds, or merely because it is possible to raise by argument a doubt on the points taken by the demurrer. In *Lane* v. *Ridley*, 10 Queen's Bench Reports, 480, where an application had been made to the Court of Queen's Bench to rescind an order of this kind made by Mr. Justice ERLE. Lord DENMAN, in delivering the opinion of the Court, after shortly stating the grounds on which the application was refused, added as follows:—

"In refusing this rule we think it right to declare our opinion that applications for such rules ought to be discountenanced. The Court must obviously

possess a discretionary power to set aside frivolous demurrers, or pleadings, to preserve its own records from abuse, the public time from being wasted, to prevent the useless accumulation of costs to the impoverishment and perhaps ruin of the client and to the ultimate advantage of those only who ought to protect him from these evils, and the delay, the defeat, the complete perversion of justice. But it is manifest that all these evils will be aggravated, if the exercise of a Judge's discretion is frequently made the subject of appeal to the Court. When the Court clearly sees an attempt to secure a triumph to falsehood by means of a bad pleading, the possibility of a doubt being raised by argument affords no reason for interfering with the Judge's discretion."

I should, before giving examples of demurrer, just mention to you that if on demurrer to one party's pleading the Court, on looking back through the record of the preceding pleadings to which the demurrer relates, should discover some prior defect of *substance* in the statements of the other party, and that at some earlier stage of the pleadings, his opponent's case being up to that time complete, such other party might have been successfully demurred to for some substantial defect apparent on his pleading, and going to the very right of the cause, then the Court will give judgment against him on the demurrer, although he may by his demurrer have hit some particular blot in his opponent's last statement;—to use an ordinary phrase,

his own case has "broken down" long ago, and therefore on the whole record it is just that judgment should be given against him. When therefore you are engaged in pleading, and perceive your opponent's last statement to be demurrable, it is very necessary before you demur (1) carefully to review your own previous pleadings.

The Court is said to give judgment on the whole record, and therefore the party who appears on the face of the whole record to have first completely failed, must have judgment against him. In this way it sometimes happens that even after verdict, when a party has succeeded at the trial, he is ultimately defeated by motion in arrest of judgment, or motion *non obstante veredicto* (2) for judgment, notwithstanding the verdict or by writ of error, because there is discovered on the face of the recorded pleadings some incurable defect in the very right of the cause, thitherto passed over.

In theory these defects are supposed to be discovered by the Court, yet generally in practice they are brought to the attention of the Court by the party seeking to take advantage of them. Thus, for instance, if a defendant's plea is demurred to, and he thinks he can contend that the plaintiff's declaration is substantially defective, he gives the

(1) Though you have a good ground of special demurrer, it is often very advisable to pass over a formal objection of that sort.

(2) A further explanation of these matters is given hereafter in Letter vii.

Court notice of his objections by stating them (1) on the margin of the demurrer books.

Though I fear this Letter proves tedious, I cannot refrain from also giving you an instance or two to shew, that the judgment of the Court on demurrer does not always determine *the action*,—such judgment is always conclusive of the matter to which it relates, and is also frequently the only judgment in the cause, and conclusive as to the whole action, but as the plaintiff may, subject to certain limitations, classify together several distinct matters of complaint, and include them in one action,—*e. g.* in one action of trespass, may complain in several distinct divisions or counts of his declaration, of several distinct trespasses,—or in one action of covenant of several separate covenants broken by the defendant, it is plain, the declaration containing in this way several counts, that a demurrer arising on the pleading to *one* of the counts only, could merely affect that branch of the declaration—that single subject-matter of complaint,—and the remainder of the cause would proceed to issue in fact, and be tried at Nisi Prius in the usual way. So also we have seen that by the statute of Anne a defendant may, by leave of the Court, plead several pleas to one count. We will suppose a case where he does so, and pleads to one count two pleas, one of these pleas is a good one, a good answer in fact, and to that the plaintiff replies on

(1) See the practice in this respect, 2 Chitty's Archbold's Prac. 83, 8th edit.

the facts, the other plea, however, is demurrable, and to that the plaintiff demurs, now judgment on the demurrer in the plaintiff's favour, only stops that one plea, it beats off that one defence,—but that is all,—the other plea, being a good one, must be tested on the facts at the trial, and will, if proved and established, alone answer that count of the declaration to which it is pleaded.

LETTER V.

Explanation of the law relating to contracts by infants, and a selection of cases, with a view to examples of issues in fact given in Letter 6.

I HAD intended in this Letter to proceed with the subject of general and special demurrers, by giving an example of each, but on looking through what has already been said on that subject, it will be better first to vary the scene a little, as it would be varied in Chambers, and to introduce to your attention some question of general law on which you may exercise your discrimination in the way of opinion merely. In thus bringing forward some question of general law, the foundation will also be laid for further examples of pleading, which could not well be understood without some previous explanation having been given of the law involved in the claims to which they are supposed to refer.

I select for this purpose a part of the law of infancy relating to contracts made by infants.

The term infant is by our law applied to a person under the age of twenty-one years, and the general rule is, that a party is not liable on contracts entered

into during infancy unless they relate to the supply of necessaries to him.

"Necessaries" for an infant are in law considered to include all such matters as he may stand in need of for his personal subsistence, and his suitable education and instruction, the term is not confined to the bare necessaries of life, but extends to such things as the infant has real occasion for, regard being had to his age, rank, and actual circumstances. The meaning of the term varies greatly with the individual and even also with the circumstances of the same individual. When therefore a tradesman sues an infant for goods supplied on his contract and promise to pay for them, and the defence of infancy is set up in answer to this claim, and to that it is replied that they were necessaries for the infant, the question that the jury have to consider at the trial under the direction of the learned Judge (who explains to them the legal meaning of the term necessaries) the question they have to consider and decide upon is, whether or no the matters supplied were required by the true wants of the individual who contracted and promised to pay for them. And I may also mention that even in cases where the matters supplied are of a nature quite suitable to the apparent wants of the individual contracting for them, yet if it be shewn that he did not in truth then want them, owing to his having had, at the time, a sufficient supply from other sources, he is not liable, because, though apparently "necessaries," in fact they were not so.

In Hilary Term, in the 17th year of the reign of King James the First, a demurrer to a plea of infancy was argued in the Court of King's Bench.

The executors of one Anthony Hornby (1) had brought an action against one Edward Chester, for the price of a certain cloak, doublet and hose, made for him to his order by the deceased Anthony. The cloak must, even for those days, have been rather a magnificent affair, as it was stated to have consumed twenty-four yards of lace, eleven yards of velvet, and three yards of broadcloth, and the doublet and hose were of velvet. To this claim the defendant, Edward Chester, pleaded, by way of defence, that at the time he contracted for these articles he was "within age." The plaintiffs, instead of attempting to answer this plea by replying thereto, that though he was an infant, as he alleged, yet that the articles were, at the time, necessaries for him, and that they were ready to prove them to be such—chose merely to demur, saying the plea was insufficient in law, merely raising this short point, that infancy could be no defence to the claim for these articles supplied to the defendant; and when the defendant had joined in the demurrer the case on the record stood thus,—that the defendant had contracted and promised to pay for the cloak, doublet and hose, but was at the time an infant "within age;" and on this demurrer the Court gave judgment against the claim, and in favour of the defendant Edward Chester. And the Court,

(1) *Ives* v. *Chester*, Cro. Jac. 560.

in giving judgment, said, that even if it had been averred that the things were for his own wear, which it had not, "yet it not being *averred* that they were *necessary and convenient for him to wear according to his estate and degree;* therefore this promise shall not bind him, and so the action not maintainable."

You will be inclined to think that the plaintiffs' special pleader, in the above case, instead of demurring to the plea of infancy, had better have *replied* to it by averring that the articles in question were *necessaries* for the infant according to his estate and degree, and so have taken his chance with a jury. But as the case occurred some two hundred years ago, and we do not know what the special pleader's instructions were, we must not assail him with a rash censure.

And very numerous are the cases which have found their way into the Reports where the question has come before the jury "necessaries or not."

This question is one of fact for the consideration and verdict of the jury, subject to the guidance of the learned Judge who presides at the trial, as to what they must assume to be the law in dealing with the facts, and subject also to the control of the Court in banc, who will set aside the verdict in a case where there was clearly no evidence to go to the jury that the articles supplied, and which they have found to be necessaries, were at the time of such supply necessaries for the infant.

I select, as an instance, the case of *Hands* v.

Slaney, decided in the year 1800, 8 Term Reports, p. 578. The defendant, though an infant under the age of twenty-one, was a captain in the army, and the question for the jury was, whether or no a certain livery supplied to his servant, and certain cockades supplied to some of the soldiers of his company, on his order, were necessaries for him or not. The jury found for the whole claim in favour of the plaintiff. A rule *nisi* for a new trial was obtained from the Court in banc, on the ground that such things as liveries and cockades could not be necessaries for the defendant. The Court, however, thought that the livery might be necessary, but that the cockades for the soldiers could not; and the plaintiff's counsel agreeing to strike out the amount of the cockades, the rule for a new trial was discharged.

Lord KENYON, C. J., in his judgment, said, "The cockades cannot be considered as necessaries for the defendant, and ought not to have been included in the damages, though it cannot be worth the defendant's while to be at the expense of another trial to apportion the damages. But as to the other article furnished, namely, the livery, I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery. The general rule is clear, that infants are liable for necessaries according to their degree and station in life. This defendant was placed in a situation

which required such an attendant. Therefore however inclined I am in general to protect infants against improvident contracts, I think that this case falls within the fair liability which the law imposes on infants of being bound for their necessaries, which is a relative term according to their station in life."

As to the question of "necessaries or not" being affected by evidence of the infant having been sufficiently supplied at the time from other sources, the rule is thus stated by Lord KENYON in *Ford* v. *Fothergill*, 1 Esp., N. P. Rep. 211, where he ruled "that the question of necessaries was a relative fact, to be governed by the fortune or circumstances of the infant, and that proof of those circumstances lay on the plaintiff; that a person trusting an infant did it at his peril; and though it had been stated that a tradesman had no business to inquire into what dealings an infant had with others, that he was of opinion that the tradesman was bound to make such inquiry; and if the infant had contracted other debts at the same time, for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of the articles being necessaries." Perhaps the meaning of "bound to make such inquiry" is best explained by what fell from Mr. Justice ERSKINE in trying a somewhat similar case, *Steedman* v. *Rose*, 1 Car. & M., N. P. Rep. 422, that the tradesman there "certainly was not bound to make such inquiries, but not having done so, he takes the chance of

their being proved not to be necessaries at that time."

Juries however, in general, give effect to this evidence with reluctance.

An opinion also seems to have partially prevailed, that if an infant had a suitable allowance, he would not contract for necessaries on credit; that as he had an allowance he had not need of credit, and ought not to have credit given him. In *Mortara* v. *Hall*, 6 Sim. 465, the VICE CHANCELLOR said, "I take it to be the law that it is the duty of those who trust infants for goods supplied to them, to make themselves acquainted with their circumstances, in order that they may determine whether the articles supplied really are necessaries or not. The question then is whether a tradesman would be at liberty to furnish an infant with the necessaries on credit when he might have known, if he had made inquiry, that the infant was supplied with an income for his support. I cannot think that a tradesman would be at liberty to supply an infant so circumstanced on credit."

The opinion here expressed underwent a great discussion in the Court of Exchequer in the case of *Burghart* v. *Hall* and others, executors, 4 Mees. & W. 727, and is controverted by the decision in that case, and we must now take the rule as to the infant having a supply from other sources, to be confined to those cases where the infant has an actual supply of the necessaries ordered, *at the time* he contracts for more. In *Burghart* v. *Hall* and others, exe-

cutors, it was decided that proof of the infant having an allowance of 500*l.* a-year, besides his pay as a captain in the Guards, was no evidence to shew that goods which he ordered were not, *at the time of such order*, necessaries for him.

Having now in some measure explained to you the law as to the question of "necessaries or not," I will in conclusion place before you two recent decisions on the same subject.

The cases are those of *Peters* v. *Fleming*, 6 Mees. & W. 42 (A.D. 1840), and *Brooker* v. *Scott*, 11 Mees. & W. 67 (A.D. 1843). These cases were instances of actions for goods supplied to undergraduates at Cambridge, to which the defence of infancy was pleaded, and necessaries replied.

In *Peters* v. *Fleming*, the action was for the amount of a bill for jewellery supplied to the defendant, who was "within age," an undergraduate, and the eldest son of a gentleman of fortune who was a member of Parliament; and on the question of "necessaries or not," the jury found a verdict for the whole amount claimed by the plaintiff. The learned Judge, who tried the cause, gave the defendant, at the trial, leave to enter a nonsuit, if the Court in banc should be of opinion that the action did not lie, and the defendant moved (1) accord-

(1) The rule as moved was for nonsuit *or* new trial, but the latter clause seems to have been quite abandoned, and the sole question to have been, "nonsuit or not;" if any one item, therefore, could be carried, the plaintiff could not be *nonsuited*, and the remainder was too trifling in amount

ingly; and the question finally came on before the Court in banc whether the plaintiff should be nonsuited or not; and in order to succeed in getting a nonsuit, the defendant's counsel must have made out in argument that the whole bill was manifestly of articles that could not be necessaries for the defendant—that there was no evidence to go to the jury as to any one of them—while on the other hand the plaintiff had this advantage, that he could meet the application, *viz.* to nonsuit him altogether, by establishing in argument that any one item in the bill might be necessaries, and was properly submitted to the jury for their verdict.

And accordingly, as you may imagine, a spirited contest ensued between the counsel for the hostile parties, as to whether or no any one item in the bill could have been necessary for the defendant. Mr. *Kelly* (1) led the argument for the plaintiff, the late Sir *William Follett* for the defendant. The old cases were cited, the old rules repeated, but the lively struggle was, as to their application. The counsel for the defendant endeavoured to dazzle the Court with the rings and jewellery, and expatiated on the ornamental character of the articles supplied, such articles were not even useful; they

to obtain a new trial on the ground that the verdict was against evidence. The bill consisted of seven items, and amounted only to 8*l.* 0*s.* 6*d.* Sometimes the reason for defending as to such small amounts is, that there are other claims outstanding which may be influenced by the decision.

(1) Now Sir F. Kelly.

were mere ornaments, and could not be *necessary*, in the proper sense of the word, for any one. The counsel for the plaintiff, on the other hand, judiciously selected the more sober items of a gold watch-chain and a seal, and urged that as to those at all events the verdict of the jury could not be disturbed. The watch-chain and seal, he said, would be proper and useful articles for a person holding the position in society which the defendant did; the one to enable him to pull out his watch (it was assumed that he had one), the other to seal his letters to his father or his friends. The watch-chain carried the day—the decision of the Court was in the plaintiff's favour, and it merely amounts to this—that a gold watch-chain *may*, under particular circumstances, be necessary for an infant. And the value of the case consists in the general statements of the law that fell from the learned Judges. From these I will make one or two extracts.

[PARKE, B.—A watch may in some cases be a thing necessary. In *Burghart* v. *Hall*, it was decided that you must lay out of the question the allowance of a suitable maintenance for the infant. The only question is, whether the things themselves are necessaries suitable to his station and degree, or not. It will be very difficult to maintain that the Judge can withdraw the question from the jury, whether such an article as a watch is not necessary; and if a watch be necessary, a chain must be also, to draw it out of his pocket, for a boy

of any age]. [ALDERSON, B.—The term "necessaries," as applied to dress, may mean those things without which the party would lose caste in society. The quantity of things furnished may be important; as, for instance, if twenty breast-pins had been supplied, they could scarcely be necessary]; and Mr. Baron PARKE, in his judgment, again says, "The true rule I take to be this—that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters therefore an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order to support himself properly in the degree, state and station of life in which he moved. If they were, for such articles the infant may be responsible. That must be a question for the jury; and it is for them to decide, upon due consideration, whether the articles were of such a description or not; and here the jury have found that they were." And this extract from Mr. Baron ALDERSON'S judgment, who after mentioning particular instances, adds, "The real question would be, whether or not what he has contracted for be such as a person in his station and rank in life would require. The articles must be for real use, and such as would be necessary and suitable to the degree and station in life of the infant. The question in these cases is this—were the articles bought for *mere ornament?* if so, they cannot be necessaries

for any one. If, however, they are bought for *real use*, then they may be necessaries, provided they are suitable to the infant's age, station and degree; the jury then must say whether they are such as reasonable persons, of the age and station of the infant, would require for *real use*. If so, they will be necessaries for which an infant will be liable."

Next comes the case of *Brooker* v. *Scott*, 11 M. & W. 67. This was the case of a confectioner's bill, consisting of charges for dinner, desserts, pastry, and fruit, supplied to the defendant, who was an undergraduate, and "within age," the bill amounted in the whole to 7*l.* 0*s.* 7*d.*, and among the items were the following:—

1841.		*s.*	*d.*
Feb. 17.	Soda-water and Acidulated Drops .	1	6
Mar. 22.	Lozenges . . .	0	4
April 13.	Oranges, Jelly, Biscuits and Pastry .	2	9

The jury returned a verdict for the plaintiff for the whole amount of his bill, 7*l.* 0*s.* 7*d.*, and leave to do so having been reserved at the trial, an application was made to the Court in banc to nonsuit the plaintiff, on the ground that no part of the bill could be necessaries for the defendant, and in this case the result differed from that in *Peters* v. *Fleming*, as the application was ultimately successful, and the plaintiff nonsuited altogether. If, as in *Peters* v. *Fleming*, the counsel in this case could have convinced the Court that any one item of the bill could be considered necessary for the defendant

under the circumstances before the jury—he would have successfully opposed the application for a nonsuit, and as in *Peters* v. *Fleming*, the watch-chain and seal were selected out of the jeweller's bill as favourable to this purpose, so in this case of *Brooker* v. *Scott* those items which are above set out were selected out of the confectioner's bill as most likely to make an impression on the Court. Those items at least, it was argued, were reasonably necessary, and if so the plaintiff could not be non-suited altogether. But the plaintiff's counsel was unexpectedly met with this observation. [PARKE, B., a dinner out of hall could hardly be a necessary. *Primâ facie*, all these articles, being eatables, are not, under the circumstances, necessaries, and the tradesman must shew them to be so]. And again—["Here you start with this, that the college supplies every thing which is necessary for a pensioner there."] In answer to this the plaintiff's counsel argued with some force, that the college did not supply every thing necessary, "the college does not supply," said he, "for instance, tea, or milk: suppose, instead of that, the party chooses to take biscuits and soda water? Are not oranges, for example, reasonably requisite for the station of life of the defendant? So lozenges may have been taken medicinally." But no,—the Judges were inexorable,—and nonsuited the plaintiff. ["If there be special circumstances you ought to shew them: but *primâ facie* an undergraduate need not dine out of hall;"] and the concluding judgment

was, "This is the case of a young man resident in the town, and having from his college every thing necessary for a person in *statu pupillari.* The only items which could possibly be necessaries under any circumstances are those to which Mr. *Humphrey* (the plaintiff's counsel) has referred. If there had been any explanation of the circumstances under which they were supplied, it might possibly have varied the case, but no explanation whatever is given of them."

Perhaps this decision has awakened your criticism —perhaps you think that soda water *and* acidulated drops to the extent of 1*s.* 6*d.* on the 17th of February, of itself sufficiently betokened a feverish state of the system, a thirst on that day, to be medicinally assuaged;—and that a jury might have reasonably found those articles to be necessary without any direct evidence of the precise reason for buying them or the precise motives of the infant—which it might be difficult for the tradesman to procure. The lozenges too in March,—when easterly winds prevail,—what could be more suitable? and only fourpennyworth,—*est modus!* the very forbearance might have convinced the Court.

LETTER VI.

Examples of issues in fact—Connected view of the pleadings in a cause as they appear on a Nisi Prius Record.

I MUST again defer giving examples of general and special demurrer, until I have furnished some further instances, founded on the last Letter, of issues in fact. We will suppose that A. brings his action against B. for the price of goods sold and delivered by him to B. You may suppose the action to be on promises and the declaration to state, the sale and delivery of the goods by the plaintiff A. to the defendant B., at a certain price, and the promise thereupon of B. to pay that amount, which he has failed to do. To this declaration the defendant B. pleads thus:—

> The defendant by —— his attorney (or if he still be an infant by —— his guardian) says that he the defendant, at the time of the making of the said contract and promise in the declaration mentioned, was an infant, within the age of twenty-one years to wit of

the age of eighteen years, and this the defendant is ready to verify, &c.

To this the plaintiff replies;—

The replication is a "traverse" or "denial" of the infancy as alleged.

The plaintiff as to the plea of the defendant saith that the defendant at the time of the making of the said contract and promise in the said declaration mentioned was of the full age of twenty-one years, and not within the age of twenty-one years as in the said plea alleged, and this the plaintiff prays may be inquired of by the country, &c.

To which the defendant rejoins:—

A pleading of this kind where either party accepts the offer of the other to try by jury, is called the "similiter."

And as to the replication of the plaintiff whereof he hath prayed it may be inquired of by the country the defendant doth the like.

Issue in fact is now joined, and the issue made up, with directions as to a writ to the sheriff to summon the jury, &c. &c.

And you will observe that the plaintiff has traversed or denied the infancy, and staked the success of his action, on the simple question for the jury, aye or no was the defendant at the time he

contracted for these goods within the age of twenty-one years?

We will now suppose the plaintiff to adopt a different mode of pleading, and that instead of *traversing* the defendant's plea of infancy, he *confesses* and *avoids* it, and we may suppose his replication in effect to be this: "True the defendant was an infant as alleged, but the goods were at the time necessaries for him suitable to his estate and condition."

The replication then would be as follows:—

Replication by way of *confession* and *avoidance*; it admits the infancy but avers that the goods were necessaries.

The plaintiff as to the plea of the defendant by him above pleaded saith that the said goods so sold and delivered as aforesaid, were, at the time of the sale and delivery thereof, necessaries for the defendant, suitable to his then estate, degree, and condition, and this the plaintiff is ready to verify, &c.

To which the defendant rejoins:—

Rejoinder *traverses* the replication of necessaries.

And the defendant as to the replication of the plaintiff saith that the said goods were *not*, nor was any part of them, necessaries for the defendant, suitable to his then degree, estate, and condition, in manner and form as the plaintiff hath in his

said replication alleged, and of this the defendant *puts himself upon the country, &c.*

To which the plaintiff surrejoins by "*doing the like,*" and issue in fact is thus joined, on the question we have discussed at so much length, "necessaries or not."

Another way of answering the defendant's plea of infancy would be by replying, that though he was, at the time of making the contract, an infant, yet that he ratified and confirmed it after he came of age. I will not say more as to what amounts to a ratification than to refer to a recent case on the subject, *Harris* v. *Wall*, 1 Excheq. 122, and add that to be complete it is required by statute (1) to be made by some writing signed by the party to be charged therewith.

I must caution you to separate the cases of "infancy" where the infant contracts and is sued, from those cases where a father or relative or any third party is sought to be charged for goods, &c., supplied to an infant. The question in such cases is not one of infancy, or of necessaries, but simply whether or no the evidence shews that the party

(1) 9 Geo. 4, c. 14, s. 5, is as follows:—"That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

sought to be charged contracted, and it may be added "that in order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person." Per Lord ABINGER, *Mortimore* v. *Wright*, 6 Mees. & W. 486.

You will have observed, from what has already been said, what the distinction is between a *traverse* and a plea by way of *confession and avoidance.*

If you were to preside over some *vivâ voce* altercation, when one party had made a statement which you perceived could not be got over, without some answer on the merits; you would find it useful to interfere, and to say to his opponent, now you must either deny that last statement point blank, or admit it to be true, and meet it with other facts.

So the science of special pleading, the invisible moderator of that kind of dispute which arises in an action at law, lays down as one of its rules, that if one party makes a good and sufficient statement which requires the other to answer it on the facts, he must do so either by a direct denial, or, by admitting the statement to be true and bringing forward new matter to avoid its effect; in other words,—he must either *traverse* or *confess* and *avoid.*

If the opposing statement is *not* sufficient, he may demur, and this is one of the three alternatives that are presented at each stage of the pleadings as they proceed to issue joined.

Here follows a connected view of the whole

pleadings in a cause as they appear on a Nisi Prius Record.

The action being one for a breach of warranty as to the soundness of a horse sold by the defendant to the plaintiff, and the defences set up being firstly, that the defendant did not warrant the horse to be sound, and secondly, that the horse in fact was sound at the time the defendant sold it.

The Nisi Prius Record, as it is handed to the Judges' Associate, engrossed on Parchment.

In the Exchequer of Pleas.

The first day of December, A. D. one thousand eight hundred and forty-nine.

Lincolnshire, to wit, } A. B. the plaintiff in this suit, by E. F. his attorney, complains of C. D. the defendant in this suit, who has been summoned to answer the plaintiff, by virtue of a writ issued on the twentieth day of November, A. D. one thousand eight hundred and forty-nine, out of the Court of our Lady the Queen, before the Barons of her Exchequer at Westminster, in an action on promises. For that whereas, before the commencement of this suit, to wit,

on the first day of June, A. D. one thousand eight hundred and forty-nine, in consideration that the plaintiff, at the request of the defendant, would buy of the defendant a certain horse for a certain price, to wit, one hundred guineas to be paid by the plaintiff to the defendant, he the defendant undertook and then promised the plaintiff that the said horse then was sound, and the plaintiff avers that he did then buy the said horse of the defendant, and pay him for the same the said sum of money. Yet the defendant disregarded his said promise, and deceived the plaintiff in this, to wit, that the said horse, at the time of the making of the said promise of the defendant, was not sound, contrary to the defendant's said undertaking, and whereby the said horse became and was of no use or value to the plaintiff, and the plaintiff hath necessarily incurred a great charge and expense of his money, to wit, to the amount of thirty pounds, in and about the causing the said horse to be examined, and the feeding, keeping, and taking care of the same, and incidental

thereto to the plaintiff's damage of one hundred and fifty pounds, and thereupon he brings his suit, &c.

The ninth day of December, A. D. one thousand eight hundred and forty-nine.

Pleas.

The defendant, by G. H. his attorney, saith that he did not promise in manner and form as in the declaration alleged, and of this he puts himself upon the country, &c.

And for a further plea in this behalf, the defendant says, that at the time of the said alleged making of the said promise by the defendant, the said horse was sound, and of this the defendant puts himself upon the country, &c.

The eighteenth day of December, A. D. one thousand eight hundred and forty-nine.

Replication.

The plaintiff, as to the pleas of the defendant, by him above pleaded, and whereof respectively he hath put himself upon the country, doth the like.

(1) Thereupon the sheriff is commanded that he cause to come here forthwith twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

Afterwards, on the (2) fourteenth day of January, A. D. one thousand eight hundred and fifty, the jury between the parties aforesaid is respited here until the fifteenth (3) day of April next, unless her Majesty's justices assigned to hold the assizes in and for the county of Lincoln shall first come on the (4) twenty-first day of March next, at the city of Lincoln, in the county aforesaid, according to

(1) This is the abbreviated form of the award of the writ of *venire facias*, commanding the sheriff that he cause to come "*here*," *i. e.* to the Court at Westminster, twelve good and lawful men, &c., *viz.* a jury to try the cause. Then follows the clause beginning "afterwards on, &c." giving the jurors a farther day to appear at Westminster on the old notion before alluded to, that the cause will be tried at Westminster, unless first "Nisi Prius" her Majesty's justices of assize shall come to Lincoln to try the cause there.

(2) Teste of distringas, the writ by means of which the jury who try the cause are summoned.

(3) Return of distringas—usually first day of Term after the assizes, but it may be made returnable any day in Term.

(4) Supposed commission day.

the form of the statute in such case made and provided, for default of the jurors, because none of them did appear, therefore let the sheriff have the bodies of the said jurors accordingly.

LETTER VII.

Examples of issues in law—In action on bill of exchange, Indorsee v. *Drawer—And shewing distinction between general and special demurrer—Selection of points of special demurrer with reported cases illustrative of each point mentioned, and concluding with a quotation from Hobart.*

As to examples of general and special demurrers.

Be so good as to recur to Letter, No. 3, and read carefully so much of it as relates to the bill of exchange, and the action thereon, by C., the indorsee and holder, against A., the drawer, on the dishonour of the bill at maturity. We will suppose it to have been a bill for 100*l.*, drawn and dated on the 1st of January, A.D. 1848, and payable one month after date, and that the form of action is "on promises," and we are then in a condition to *declare.*

Having recurred to Letter, No. 3, you will have observed that if any one of the five events specified as material to C.'s right of action on the bill, has not taken place, the plaintiff C. cannot recover the amount from the defendant A. In order therefore for the plaintiff's declaration to be sufficient it must

allege all those events to have happened, and when formally drawn out would be as follows:—

* Or other county where the cause is to be tried.

*Middlesex** } C., the plaintiff in
to wit. } this suit, by —— his attorney, complains of A., the defendant in this suit, who has been summoned to answer the plaintiff in an action on promises; for that whereas the defendant, on the first day of January, A. D. one thousand eight hundred and forty-eight (1), made his bill of exchange in writing, and directed the same to one B., and thereby required the said B. to pay to him the defendant, or his order, the sum of 100*l.* one month after the date thereof, which period had elapsed before the commencement of this suit; and the defendant then indorsed (2) the said bill to the plaintiff, and the said B. did not pay (3) the said bill, although the same was presented (4) to him for payment on the day when it became due; of all which the defendant then had due notice (5), and the defendant then, in consideration of the premises, promised (6) the plaintiff to pay to him the said sum of money in the said bill specified on request; yet the de-

(1) The drawing of the bill.

(2) Indorsement by the defendant to the plaintiff.

(3) Non-payment by B.

(4) Presentment to B. for payment.

(5) That defendant had notice of the dishonour.

(6) Then the plain legal inference that A. became

forthwith liable to pay the amount of the bill to B.

fendant hath disregarded his said promise, and hath not paid the said sum of money, or any part thereof, to the plaintiff's damage of 110*l.*, and thereupon he brings his suit, &c.

As the declaration stands it is free from objection, and the defendant must, if he defends, answer it on the facts; but suppose we strike out the words "of all which the defendant had due notice," there is at once a defect of substance in the declaration, and it is bad on general demurrer; and the body of the demurrer would run thus:—

> The defendant by —— the attorney, says that the said declaration is not sufficient in law.

And unless the plaintiff abandoned his action, or applied for leave to amend, he would join in demurrer as follows:—

> The said plaintiff saith that the said declaration is sufficient in law.

But we will leave in the declaration all the substantial averments, and strike out only these words, "and the defendant then, in consideration of the premises, promised the plaintiff to pay to him the said sum of money in the said bill specified on request."

Now as it is plainly to be inferred as a matter of law, from the facts already set out in the declaration, that the defendant did so promise, the omission to state that conclusion in terms is not very important; still, the strictness of special pleading requires it to be stated, and not to state it would be to leave the declaration open to a special demurrer, which in the body thereof would run as follows:—

> The said defendant by —— his attorney says, that the said declaration is not sufficient in law, and the defendant shews to the Court here the following causes of demurrer (1) to the said declaration; that is to say, that the said declaration does not state, allege, or contain any promise by the defendant to pay the said bill of exchange, or any promise by the defendant to pay the sum of money in the said declaration mentioned, and that it is not in the said declaration stated or shewn that the defendant promised to pay the said sum of money in the said declaration mentioned.
>
> The plaintiff joins in demurrer as before.

In either of the above instances after joinder in demurrer, the demurrer books are made up, copies

(1) See this special demurrer in *Smith* v. *Cox*, 11 M. & W. 475.

furnished to the Judges, and in due time the demurrer comes on for argument before the Court in banc.

I must caution you against supposing that an allegation of a promise in an action on promises is usually matter of mere form. It is so in the above case, because the declaration sets out *in extenso* the whole chain of facts from which the law implies the promise.

It might interest you some day to compare the case of *Smith* v. *Cox*, 11 M. & W. 475, with that of *Hayter* v. *Moat*, 2 M. & W. 56.

Such is the distinction between general and special demurrers, general demurrers going to matters of substance, such as a material defect in the plaintiff's claim, as it appears in the declaration, or a plea professing to give an answer which on examination proves on the face of it to be no good defence, or any subsequent pleading which substantially fails to meet the one to which it is opposed; as for instance, a replication which denies some part of the plea which is not material, and so tenders an issue wide of and immaterial to the merits of the defence set up by the plea. Special demurrers on the other hand, going to matters of form, and being the means, as may be observed in the few examples that follow, of enforcing correct modes of statement in pleading.

One ground of special demurrer to a pleading is, that it is argumentative, "a plea ought to be direct

and positive and not by way of rehearsal or argumentative;" Co. Lit. 303 *a.*; Com. Dig. tit. Pleader, (E. 3). Another ground is that it is double, for instance, if one plea combines more than one matter of defence, it is bad for duplicity, though one matter or the other be not well pleaded; "a double plea is bad, though one matter or the other be not well pleaded, as in trespass (for assault) if the defendant pleads *molliter manus imposuit* and a release, it is double though the release is not well pleaded." R. Sid. 176; Com. Dig. tit. Pl. (E. 2). Another ground of special demurrer is uncertainty.

Taking then, by way of example, from among others, these three grounds of special demurrer, *viz.*, argumentativeness, duplicity, and uncertainty; let us proceed to an instance of each.

Argumentativeness.

Suppose a declaration in an action of detinue for the wrongful detention by the defendant of certain scrip certificates belonging to the plaintiff, stating in substance, that the plaintiff had delivered to the defendant certain scrip certificates of the plaintiff of value to be redelivered by the defendant to the plaintiff on request, after payment by the plaintiff to the defendant of a certain specified sum of money, and that the plaintiff had since paid the said sum of money to the defendant, and concluding, "yet the defendant hath not as yet delivered the said scrip certificates, or any or either of them, to the plaintiff, although he was after the said payment, to

wit, on, &c., requested by the plaintiff so to do, and hath unjustly detained and still doth unjustly detain the same from the plaintiff to the damage, &c."

And that in answer to this the defendant pleads, his having tendered and offered on his part to deliver up the scrip certificates to the plaintiff, and a refusal by the plaintiff to accept them, shewing by the statements of the plea that though he, the defendant, had the *actual possession* of the scrip certificates, there was no *detention* of them by him as alleged in the declaration.

Now the above plea *substantially* answers the complaint in the declaration, because it shews (though indirectly and argumentatively) the defendant not to be guilty of the adverse detention of the scrip certificates as alleged in the declaration, but the defence, though substantially a good one, is not pleaded in accordance with the rules of special pleading, inasmuch as the denial of the detention ought to have been a direct denial, and not a merely inferential and argumentative one, and it is therefore bad on special demurrer for argumentativeness. See *Clements* v. *Flight*, 16 Mees. & W. 42.

And the established form of plea in detinue *denying* the adverse detention of the goods, and which is called the plea of *non detinet*, is in the following form:—

> The defendant by —— his attorney, saith that he doth not detain the

said goods and chattels (or "scrip certificates," *as the case may be*), or any of them or any part thereof, in manner and form as the plaintiff hath above complained against him, and of this the defendant puts himself upon the country, &c.

Duplicity.

In the case of *Stephens and another* v. *Underwood*, reported 4 Bing. N. C. 655, to an action on a bill of exchange, the defendant, the acceptor, pleaded that before and at the time of making the acceptance, the defendant was unlawfully imprisoned by the plaintiffs and others in collusion with them, and was then and there detained in prison until by the force and duress of the said imprisonment he made the said acceptance; that he had never had any value for the said acceptance, or for paying the said bill of exchange, or any part thereof respectively, and that he was ready to verify, &c.

Demurrer. For that the plea was double and multifarious in this, that it contained two separate and distinct matters of defence to the said count, to wit, that the acceptance of the said bill in the said count mentioned was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment; and that there never was any value or consideration for the said acceptance; also, for that

the plea was so pleaded that the plaintiffs could not take or offer any certain issue thereon.—*Joinder.*

The Court held the plea bad for *duplicity, i. e.* for the cause assigned in the special demurrer, *viz.*, "that it contained two separate and distinct matters of defence, to wit, that the acceptance of the said bill was unlawfully obtained by the plaintiffs from the defendant by duress of imprisonment, and that there never was any value or consideration for the said acceptance."

Uncertainty.

The law of pleading as to *certainty* more than on any other point requires to be illustrated by a number of instances, and is not capable of any precise definition. The term *certainty* has been said to signify a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the Court who are to give judgment (1). It is to be observed moreover, that the degree of certainty required *varies* considerably, though by just modification, according to the nature of the statement to be made, and the position of the party from whom the allegation comes. But to give one instance

(1) See Chitty on Pleading, 7th edit. by Greening, 257, and *Rex* v. *Horne*, Cowp. Rep. 682, per Lord Chief Justice GREY.

of uncertainty in pleading, *e. g.* in a plea of justification in an action for defamation, a case in which certainty of pleading is enforced with strictness.

The case is reported 10 Mees. & W. 361, and the declaration stated in substance that the defendant charged the plaintiff, a pawnbroker and silversmith, with committing the unfair and dishonourable practice of "duffing," *i. e.* of replenishing or doing up goods, being in his hands in a damaged or worn out condition, and pledging the same with other pawnbrokers.

Plea, that the plaintiff did replenish and do up divers goods then being in his hands in a damaged and worn out condition, and did pledge the said goods with divers other good and worthy subjects of this realm, then being pawnbrokers, and that the defendant was ready to verify.

Special demurrer, assigning for causes, that it was not stated by the plea what goods, or what kind of goods being in a damaged condition the plaintiff replenished and did up, nor with what pawnbroker or pawnbrokers the said goods so replenished and done up were pledged.—*Joinder.*

The plea was held bad for uncertainty, and the following is the judgment of Mr. Baron PARKE:—

"It is a perfectly well-established rule in cases of

libel or slander, that where the charge is general in its nature, the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff. That is settled by the cases of *J'anson* v. *Stuart*, *Newman* v. *Bailey*, and *Holmes* v. *Catesby*. In some of those cases, perhaps, the statement in the plea was not so specific as it is here, but still this is not specific enough: the plea should have stated the description of the goods, or at least the names of the pawnbrokers with whom they were pledged. As it is, the statement is so general, that the plaintiff cannot know with what he is intended to be charged. The defendant is bound to give him information of some specific acts with which he intends to charge him. This plea does not do that, and is therefore bad. With respect to the cases which have been referred to, of actions for not accounting for monies, the reason for the exception in those cases is, that there the charge is for not accounting for an aggregate sum received; and it is held to be sufficient, in order to avoid multiplicity of pleading, to assign a general breach, that the defendant received divers sums of money, which he did not pay over. None of those decisions have any application to cases of libel or slander. The plea is therefore bad, and the judgment must be for the plaintiff."

Such is the system of special pleading, and such are the means by which it leads the contending

parties in an action at law to clear points of difference on which the cause may be tried and determined, and so great and peculiar are the advantages of this part of English jurisprudence, that it has been eulogised by the most eminent men, in terms of the strongest approbation, even at times when it was attended by many defects and inconveniences which have since been carefully removed.

"LITTLETON says, that the pleading is the honourable, commendable, and profitable part of the law, and by good desert it is so. For cases arise by chance, and are many times intricate, confused, and obscured, and are cast into form and made evident, clear, and easy both to Judge and jury, (which are the arbitrators of all causes), by good and fair pleading; so that this is the principal part of the law, for pleading is not talking—and therefore it is required that pleading be true, that is the goodness and virtue of pleading, and that it be certain and single—and that is the beauty and grace of pleading." Hobart, 295.

LETTER VIII.

Motion in arrest of judgment—Motion for judgment non obstante veredicto—Writs of error—Error in law—Error in fact or error coram nobis—The Court of Error for error in law how constituted—Note as to repleader.

I HAVE already mentioned in Letter V., that a party who has succeeded at the trial, may be ultimately defeated by a motion in arrest of judgment, or for judgment *non obstante veredicto*, or by writ of error. I will now proceed to give a brief explanation of these several proceedings.

A rule to arrest the judgment will be granted by the Court on the motion of the defendant, although the verdict has been gained by the plaintiff, at the trial at Nisi Prius, if there appear some incurable error in the plaintiff's pleadings, which shews his claim on the face of the record to be substantially defective.

Judgment may be arrested not only after verdict on issue joined, but also where judgment has gone

by default, *i. e.* has been signed by the plaintiff, according to the practice of the Court, for the defendant's default in not putting in any plea in answer to the plaintiff's declaration. If then the declaration in such case be substantially defective, the Court will arrest the judgment; not so, in the case of judgment on *demurrer*. "The defendant shall not come to arrest the judgment on the return of the inquiry (1) for an exception that might have been taken on arguing the demurrer; the parties cannot be said to come as *amici curiæ*. Nor shall any body tell us that the judgment we gave on mature deliberation is wrong; it is otherwise indeed in the case of judgment by default, for that is not given in so solemn a manner, or if the fault arises on a writ of inquiry or verdict, for there the party could not allege it before, *How* v. *Godfrey*, Mich. 4 Geo. 2." *Edwards* v. *Blount*, 2 Stra. 425.

A rule for judgment *non obstante veredicto* is granted by the Court on the application of the plaintiff, where the defendant by his defective pleading confesses a cause of action in the plaintiff without showing any sufficient avoidance of the same. "The principle of judgment *non obstante* is, that there is a confession of a cause of action without any avoidance." "The principle on which such a judgment proceeds as against a defendant is, that he has confessed the plaintiff's action, and avoided

(1) As to writ of inquiry after judgment on demurrer. See *ante*, Letter II.

by matter which is *in substance* no answer to the plaintiff's action, and in such a case, although the issue raised upon that matter has been found for the defendant, yet the Court gives judgment for the plaintiff as upon *a confession*," Per PARKE, B., see 15 M. & W. 537, and *Gwynne* v. *Burnell*, 6 B. N. C. 453, the latter quotation being from the opinion of PARKE, B., delivered to the House of Lords, in *Gwynne* v. *Burnell*, all the Judges there expressing an opinion to the same effect. In such a case then, of confession without any sufficient avoidance, although the defendant gains *the verdict* on the defective pleading, the plaintiff succeeding on the other issues, if any, is entitled to the judgment of the Court *non obstante veredicto*, i. e. *notwithstanding the verdict* so obtained by the defendant. (1)

(1) It should be mentioned here that there are cases in which, though the pleadings are defective, in some material particular, the Court can neither arrest the judgment, nor give judgment *non obstante veredicto*, but will, on motion, award a repleader, which compels the parties to plead over again. For instance, take the case of a single plea being pleaded, traversing some immaterial part of the declaration in a cause; and the plaintiff, instead of demurring, inadvertently joins issue thereon, though the plea, in some sense, by way of implication, admits the remaining part of the declaration, in so far as it does not deny it; yet it does not *confess* it as it would be *confessed* by a plea in confession and avoidance, and, therefore, if the defendant gains the verdict at the trial on the issue of fact, joined on his immaterial traverse, the Court cannot give judgment for the plaintiff *non obstante veredicto*, because that can only be *as upon confession*, and the Court has not before it any confession, but

A writ of error in law lies in either of the above cases at the option of the party, and is the only mode of appeal where the time has passed by within which by the practice of the Courts, a motion in arrest of judgment, or for judgment *non obstante veredicto*, must be made.

simply an issue joined on the denial of an immaterial fact or allegation, which will not enable them to determine the merits of the cause. In such case a repleader should be awarded, see the case of *Gwynne* v. *Burnell* above referred to, which so far as it relates to this point, turned upon the effect of a bad rejoinder, purporting to be by way of traverse of part of the plaintiff's replication.

Let us next take a case where the plaintiff's pleadings are substantially erroneous, and yet, on the same principle as that referred to, judgment cannot be arrested. Suppose a good plea by a defendant to a good declaration, and that the plaintiff does not reply to this plea by way of confession and avoidance, but simply traverses an immaterial part of it. The defendant joins issue on this immaterial traverse, and the verdict is found in his the defendant's favour. Here there has been no confession of the defendant's plea by the replication, but simply a denial of a fact, or allegation of the plea, that is wide of the real defence, and altogether insufficient to determine the merits of an action—under these circumstances the Court will not arrest the judgment, but will award a repleader, in order that the parties may come to some issue on which the merits of the cause may be determined. This appears to have been first expressly decided in the case of *Gordon* v. *Ellis*, 2 D. & L. 308; 7 M. & G. 607, in accordance with the opinion previously expressed by Parke, B., in the case of *Atkinson* v. *Davies*, 11 M. & W. 242, as follows:—"The opinion of all the Judges in the case of *Gwynne* v. *Burnell*, that judgment *non obstante veredicto* can be awarded on a pleading by the

The case however, in which a writ of error is most ordinarily brought, is where there has been an issue in law, that is, a demurrer and joinder therein, and judgment having been delivered by the Court in which the action is brought, the party against whom such judgment has been given is dissatisfied with it, and seeks to reverse it in the Court of Error, which is composed of the Judges of the two other Courts. There are some very peculiar cases of rare occurrence in practice, in which a writ of error "*coram nobis*" '*before ourselves,*' *i. e.* before the *same Court* in which the action is brought, for error *in fact,* that is to say a writ of error bringing to the notice of the Court a fact which does not appear on the record, but which renders the proceedings invalid.

Thus, for instance, where the defendant in the action was a married woman when the suit was

defendant, in confession and avoidance only, and not on the implied confession in a rejoinder of the part of a replication which it does not answer, seems to lead to the conclusion, that the judgment for the plaintiffs could not be arrested, on the ground that the traverse of a part of the plea contains an implied confession of the residue. The proper course seems in both cases to award a repleader."

But the Court will not award a repleader, where, besides the immaterial issue, there are one or more other issues on which the cause may be properly tried and determined, *Negelen* v. *Mitchell,* 7 M. & W. 612. And a repleader is not grantable in favour of the person who made the first fault in pleading, *i. e.* supposing the immaterial issue is found *against him.* See Wms. Saund. vol. 2, 319, d. g.

commenced, the husband might after judgment bring a writ of error for error in fact.

The Court of Error for error in law is the Court of Exchequer Chamber constituted under the 8th section of 11 Geo. 4 and 1 Wm. 4, c. 70, which is as follows: "And be it further enacted, that writs of error upon any judgment given by any of the said Courts, shall hereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the two other Courts in the Exchequer Chamber, any law or statute to the contrary notwithstanding, that a transcript of the record only shall be annexed to the return of the writ, and the Court of Error, after errors are duly assigned and issue in error joined, shall at such times as the Judges shall appoint, either in Term or Vacation, review the proceedings and give judgment as they shall be advised thereon, and such proceedings and judgment as altered or affirmed shall be entered on the original record, and such further proceedings as may be necessary thereon shall be awarded by the Court in which the original record remains, from which judgment in error no writ of error shall lie or be had, except the same be returnable in the High Court of Parliament."

LETTER IX.

Forms of actions—Mode in which actions are commenced—The writ of summons—Uniformity of process act—Multiform processes in existence before that act—Note as to 1 *&* 2 *Vict. c.* 110, *and as to* mesne *and* final *process and arrest thereon—Actions "on promises," "of debt," and "of covenant," distinguished—Difference between an action "of trespass" and "an action on the case"—Forms of declaration in trespass and case—List of personal actions—With instances—The common* indebitatus *counts—Conclusion.*

THERE are many other things that might be brought to your notice, but a limit must be placed to these few Letters.

The term "form of action" has been more than once brought forward in these Letters, and you have no doubt already conjectured that there are different forms of action for different classes of complaints. The law prescribes certain forms of action under which complaints are suitably classed, and complainants in the superior Courts are not allowed to misapply or to confuse them one with another. If,

therefore, a plaintiff sues in a wrong form of action, a form which is not the remedy which the law prescribes for the injury complained of, or if he misjoins in one action complaints which respectively belong to separate forms of action, his proceedings are defective and erroneous. At the present day, when the plaintiff has committed a mistake as to his form of action, it does not appear until declaration that he has done so. The writ of summons it is true must, to be regular, state concisely and clearly (1) the form of action in which the plaintiff sues, and may be set aside for irregularity if it omit to do so; yet though the writ of summons states the form of action, the declaration is the first statement of what the subject-matter of the action is, and in the declaration therefore it must first appear whether the form of action previously chosen is the right one or not. It had been the practice, from very ancient times, that the process by which actions were commenced should not only shew the form of action, but set out the subject-matter of complaint; and I may also here observe that besides this, at the time of passing the Uniformity of Process Act in May, 1832, and which followed the report of the Commissioners, or the Courts of common law, the number and variety of the different processes by which actions were commenced, was a great and acknowledged evil, this evil was fully dealt with and exposed by the learned Com-

(1) *Youlton* v. *Hall*, 1 Dowl. P. C. 686.

missioners in their first Report, where they then made those valuable suggestions to which we owe the present improved state of the practice as to summoning and enforcing the appearance of defendants. I may extract two short passages from this Report which are sufficient to shew their opinion and state of things that existed at that time (1).

"When it is considered that the final object of all these multiform processes is the same, *viz.* the enforcement of the defendant's appearance, occasionally combined with that of arresting (2) his

(1) 1st Report of Commissioners on Courts of Common Law, 75.

(2) By the Uniformity of Process Act, which followed after this Report, in 1832, there were two modes of commencing a personal action, *viz.* by writ of summons or serviceable process, or by writ of capias or bailable process where it was intended to arrest the defendant and hold him to bail; but in 1838 another Act was passed, 1 & 2 Vict. c. 110, which after reciting, "Whereas the present power of arrest on mesne process is unnecessarily extensive and severe, and ought to be relaxed," proceeded by the 1st section to abolish arrest on mesne process (except in the cases and in the manner thereinafter provided for); and by the 2nd section to direct *all personal actions in her Majesty's superior Courts of Law to be commenced by writ of summons*; and though there follows in the same statute a provision for arrest on mesne process under a Judge's order, in certain specified cases where the defendant is about to quit England, still the action in which the arrest is made must be first commenced by writ of summons; the capias, if granted, being an entirely collateral proceeding. As to the

person as a security for ultimate execution, their diversity is calculated to excite surprise, nor is that feeling much lessened when its causes are explained."

And again (1).

"We conceive, therefore, that there is no good ground for the existing variety in the modes of process; and assuming this to be the case, we have no hesitation in pointing out that variety as a great inconvenience attending the administration of the law, and a subject on which reform is obviously desirable. It is one of the main causes of those differences in the practice of the respective Courts, which for reasons explained in another part of this Report,

practice on this point see the observations of Mr. Justice COLERIDGE in *Rennie* v. *Bruce*, 2 Dowl. & L. 947, 951.

On *final* process, however, for the amount of final judgment, the defendant, except in certain privileged cases, may still be taken in execution. And as to final process, I should here add that a subsequent statute, 7 & 8 Vict. c. 96 (A. D. 1844), s. 47, enacts as follows:—

"And whereas it is expedient to limit the present power of arrest upon final process; be it enacted, that from and after the passing of this Act no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior Courts, or in any County Court, Court of Requests, or other inferior Court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of 20*l.* exclusive of the costs recovered by such judgment." But another section (s. 59) in the same Act gives a power to the Judge who tries the cause to imprison for fraud.

(1) *Ibid.* p. 78.

it is so important to abolish. It is productive also in each Court, separately considered, of much unnecessary complexity in its practice, and consequently conduces in various ways to chicanery and expense. To enter into proof of these propositions would be tedious, and they are too obvious to require such support. But in illustration of them it may be remarked that in a work (1) of acknowledged ability on the practice of the Courts, and distinguished for its condensation and exclusion of extraneous matter, there are two chapters, containing thirty-seven pages, on the process by original writ in the King's Bench and Common Pleas; twelve pages more on the process in either Court against peers, members of the House of Commons, corporations and hundredors; twenty-one on the process by bill of Middlesex and latitat in the King's Bench, by common capias in the Common Pleas, and the process in the Exchequer; eight on the manner of proceeding against attornies, and twenty-three on the proceedings against prisoners; besides which there are statements of fifty-three pages on the practice in the different cases where the defendant is merely served and where arrested, and on the matters of entering and perfecting appearance; the total disquisition on process, and on cases where no process is necessary, thus extending to one hundred and fifty-four closely printed pages large octavo. Yet after mastering these, the student has not advanced (it will be observed) beyond that early era

(1) "Tidd's Book on Practice, 8th edit."

in the history of the suit in which the defendant first appears to the action; and the whole substance of the litigation is still to follow."

On the recommendation then of the learned Commissioners the Uniformity of Process Act, 2 Wm. 4, c. 39, entitled, "An Act for Uniformity of Process in personal actions in his Majesty's Courts at Westminster," was passed, and introduced a new and simplified system of process for the commencement of PERSONAL actions, sweeping away the old one, adopting only so many of its characteristics as were necessary and useful, and making uniform the practice on this head in all the three superior Courts. It is mainly on this statute (1), and the general rules promulgated by the Judges under its 14th section, that all questions of practice as to process for enforcing the appearance of defendants now turn. These, as already stated, I do not intend to enter upon. But as to the form of action, though the first process no longer sets out the subject-matter of complaint, yet it must concisely mention the form of action in which the plaintiff summons the defendant to answer him, *e. g.* in an action on promises, [or as the case may be], you will see this from the form of the writ of summons directed by the Act, which was as follows:—

(1) See also 3 & 4 Wm. 4, c. 67; also 1 & 2 Vict. c. 110, s. 2.

Writ of Summons (1).

William the Fourth, &c.

To C. D. of, &c., in the county of greeting:

We command you, [*or* as before *or* often we have commanded you,] that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of , in an action on promises [*or as the case may be*], at the suit of A. B. And take notice, that, in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution.

Witness at Westminster, the day of

Memorandum to be subscribed on the Writ.

N. B. This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

Then follow certain indorsements which are directed to be made.

You see therefore that as the form of action must be mentioned in the writ it is of importance that the right form be chosen before the writ is issued.

As to the different forms of action, and to what applicable, you will find a moderate degree of

(1) Form, No. 1. in schedule referred to by the act.

attention to the law on this subject as laid down in the different books of pleading and practice, and the authorities to which they refer will enable you to determine without difficulty in most cases that occur, what the form of action should be, though I must not mislead you into the supposition that there are not as nice and difficult questions occasionally arising on this head of law as on any other. Mistakes also frequently occur in issuing the writ in 'debt,' instead of 'promises,' where the latter is the only suitable form of action. There is a preference for 'debt,' because in that form of action judgment is final in the first instance, and there is in general (1) no occasion for a writ of inquiry, and with this preference for debt there is on the part of attornies a corresponding desire for the advantage of their clients, to sue in that form, in cases where they think they have the option of doing so, and this as every pleader knows very well frequently leads to the writ being issued in the wrong form of action.

There are a great many cases in which debt or assumpsit (2) (*i. e.* an action on promises) lies indifferently, for instance, on any direct contract between two parties, not under seal (3), but on a

(1) On judgment by default in debt on bond so conditioned that breaches must be suggested under 8 & 9 Wm. 3, c. 11, s. 8, a writ of inquiry would be necessary.

(2) "Assumpsit," "he hath promised," another term for "promises."

(3) *i. e.* not a deed. "A deed is a writing containing

good consideration, that one shall pay the other a sum certain, the day of payment having elapsed and the money become wholly due and payable, either 'promises' or 'debt' lies. There is a promise, and it is broken, and the creditor may so describe his cause of action and recover the specific sum that is due, but *mutato nomine* the same thing is a debt, there is an ascertained sum due and in arrear, payable from one party to the other, on a valid contract to which both are privy, and there is therefore a debt in arrear, and an action has accrued to the creditor to demand and have the same in that form of action called 'debt.' On the other hand, if this contract not under seal but on a good consideration, were that the one party should do some act for the other of a different character than the payment of a sum of money, for instance, 'go to Rome,' then a refusal or failure to do so manifestly could not create a debt, there would be nothing actually due, though the journey to Rome which was bargained for had not been performed and an injury in consequence sustained. For such injury, however, *damages* may be recovered, and the action must, as the phrase is, sound in 'damages,' and cannot be in 'debt,' but though debt does not lie 'promises" will, for "*an assumpsit lies upon every executory promise not performed and made upon good consideration.*" *Com. Dig. Assumpsit.* (A. I.)

a contract, and signed, *sealed* and *delivered* by the party. Co. L. 35, *b*." *Com. Dig.* tit. *Fait* (A. I.)

Again, "*Debt lies upon every* (1) *express contract to pay a sum certain as if a man covenants or grants to pay.* R. 1 Leo. 208." *Com. Dig.* tit. *Debt* (A. 8.)

But though on such a direct covenant under seal "debt" lies, yet "promises" does not, for "promises" or assumpsit applies only to contracts, whether implied or express, which are not under seal, and a promise under seal is termed a *covenant*, and in the case last mentioned either *covenant* or debt may be brought on the covenant to pay.

But if the covenant were not for the payment of a sum of money but for the doing of some act of a different character, for instance, 'to go to Rome;' then on refusal or failure to do so, though the covenant would be broken, there would be no debt, but an injury thereby sustained for which *damages* might be recovered; and though an action of debt could not be brought, yet an action of *covenant* could, for covenant "sounds in damages," and "*covenant lies when a man covenants with another by deed to do something, and does it not.*" F. N. B. 145 A. *Comyn's Digest*, tit. *Covenant* (A. I.)

(1] "*Every* express contract." "The term contract comprises, in its full and more liberal signification, every description of agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound, expressly or impliedly to another, to pay a sum of money, or perform or omit to do a certain act; but in its more familiar sense it is most frequently applied to agreements not under seal." "Chitty on Contracts," 3rd edition, p. 2. See also Smith's Lectures on the Law of Contracts. Agreements, not under seal, are called "simple contracts."

From the above one or two plainer instances you will perceive the nature of the distinctions that prevail as to forms of actions. You may find another instance of the question "debt or promises" in actions on bills of exchange between particular parties according to their relative position, in *Watkins* v. *Wake*, 7 M. & W. 721, and *Lewin* v. *Edwards*, 9 M. & W. 720, in these the law is equally certain, though the reason is not quite so intelligible.

I may as well also instance a difference between 'an action of trespass' and 'an action of trespass on the case,' or 'action on the case,' as it is usually termed. A party, himself driving, on a dark night, and on the wrong side of the road, drove his carriage against that of another, who sued him in trespass for the damage sustained by the shock, which was not intentionally inflicted, and it was held by the Court of King's Bench that the action was right in point of form, and that "trespass" and "not case" was the appropriate remedy for the complaint; and Lord ELLENBOROUGH said, "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases, both ancient and modern. It is immaterial whether the injury be wilful or not. As in the case alluded to by my Brother GROSE, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet

having accidentally wounded a man it was holden to be a trespass, being an immediate injury from an act of force by another." *Leame* v. *Bray*, 3 East, 598.

But suppose a different case. That a party carelessly left open his cellar door, and that another in consequence of that wrongful act fell into the cellar, and was wounded, there the injury being consequential, and there being no immediate force or violence from the wrong doer, an action "on the case," and not "trespass," would be the proper mode of proceeding.

Thus in *Day* v. *Edwards*, 5 Term Reports, 648, Lord KENYON said, "The distinction between actions of trespass *vi et armis* and on the case is perfectly clear. If the injury be committed by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action on the case is the proper remedy." In 1 Stra. 636, it is said, "If a man throw a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong; but if, as it lies there, I tumble over it, and receive an injury, I must bring an action upon the case." In the present case the plaintiff complains of the immediate act, and therefore, he should have brought trespass.

Here follows an instance of a declaration in *trespass*:—

Middlesex, } A. B., the plaintiff
to wit. } in this suit by —— his attorney, complains of C. D., the defendant in this suit, who has been summoned to answer the plaintiff in an action *of trespass*; for that the defendant, on the first day of December, A. D. one thousand eight hundred and forty-nine, with force and arms drove a certain carriage in which the defendant was then riding, upon and against a certain other carriage of the plaintiff, in which the plaintiff was then riding, and thereby then caused the plaintiff to fall and be thrown out of his said carriage, whereby the plaintiff's arm was then broken, and he the plaintiff was otherwise much hurt, whereby the plaintiff then became and was sick and disordered, and so continued for a long space of time, to wit, for the space of two months then next ensuing, during all which time the plaintiff suffered great pain and was prevented from transacting his necessary affairs and business, and also thereby the plaintiff was obliged to incur and did then

incur great expenses, to wit, to the amount of 30*l.*, in and about the endeavouring to be cured of the injuries so sustained by him as aforesaid, and other wrongs to the plaintiff then did; against the peace of our Lady the Queen and to the damage of the plaintiff of 100*l.*, and thereupon he brings his suit, &c.

Here follows an instance of a declaration in *case*:—

Middlesex, } A. B., the plaintiff
to wit. } in this suit, by —— his attorney, complains of C. D., the defendant in this suit, who has been summoned to answer the plaintiff in an action *on the case*; for that whereas heretofore and at the time of the committing of the grievance by the defendant as hereafter mentioned, there was and from thence hitherto hath been and still is a certain common and public highway in the county aforesaid, for all the liege subjects of our Lady the Queen, to go, pass and repass at all times, with carriages and otherwise, at their free will and pleasure, yet the defendant,

well knowing the premises heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and forty-nine, wrongfully threw and cast into the said common and public highway a certain log of wood, and there then left the same, whereby and by reason whereof a certain carriage of the plaintiff, in which the plaintiff was then riding, then lawfully passing in and along the said highway, came in contact with the said log of wood, and was with great force overturned and the plaintiff was thereby then thrown with violence out of the said carriage and greatly hurt and bruised, whereby the plaintiff then became and was sick and disordered, and so continued for a long space of time, to wit, for the space of one month then next ensuing, during all which time the plaintiff suffered great pain and was prevented from transacting his necessary affairs and business, and also thereby the plaintiff was obliged to incur, and did then incur expenses, to wit, to the amount of 20*l.*, in and about endeavouring to be cured of the injuries so sustained by him as

aforesaid, to the damage of the plaintiff of 50*l.*, and thereupon he brings his suit, &c.

Whilst on this subject it may be as well to give the names of the personal actions commenced in the superior Courts with *one* example of a case under each.

These personal actions then are actions "on promises," "of debt," "of covenant," "of detinue," "of trover," "of trespass," and "on the case."

"*On Promises.*"—For breach of promise of marriage, action should be brought on "promises."

"*Of Debt.*"—100*l.* due to plaintiff on a bond conditioned to pay that sum—he rightly sues in "debt."

"*Of Covenant.*"—A. grants a lease to B. under seal, and B. in the indenture of lease between A. and himself covenants to keep the premises in good repair during the term, and fails to do so; A.'s remedy against B. is an action "of covenant."

"*Of Detinue.*"—One party improperly detains some specific chattel belonging to another who has both the property and the right to the possession of such chattel, "detinue" lies for the wrongful detainer.

"*Of Trover*" (1).—If the party wrongfully de-

(1) Trover is a species of the action on the case, and is so regarded in modern practice; so that if the writ of sum-

taining the above chattel convert it to his own use, either by actually disposing of it, or by assuming to have that right as being himself the owner, for such conversion trover lies.

"*Of Trespass.*"—If the party had seized and taken the above chattel from out of the possession of the owner, then trespass for such seizing and taking would have been the proper form of action.

"*Action on the Case.*"—If a party on his own land divert a watercourse which ought of right to flow on to the land of another, "case" is the remedy for such wrongful act.

"*Replevin*" is another personal action, and is said to lie generally at the suit of the owner of goods or chattels when they have been taken unlawfully from him by another; it is however confined in practice to cases where parties seek the restoration of goods or chattels seized under a distress, where the right to distrain is denied. Replevin commences by plaint to the sheriff, and is afterwards, if of sufficient importance, removed into the superior Courts; the action is attended with many peculiarities, and is of less frequent occurrence than the rest.

Another action, usually termed "a mixed action," is the action of ejectment; this is the ordinary and common action for the recovery of lands, and is

mons be in action on the case, you may declare or have a count in trover.

usually termed a mixed action—mixed, because both the land and damages are within its recovery. It is not commenced by writ of summons, but is conducted throughout by modes of proceeding peculiar to itself.

And under one or other of the above forms come nearly every civil action that you ever hear of being tried in the superior Courts of common law. As to the action on the case, I would here observe that it embraces a much greater variety of wrongs than you may have supposed from the one or two examples already given of those to which it is applicable; this may be perceived from the following definition:—"Actions (1) on the case are founded on the common law, or upon Acts of Parliament, and lie generally to recover *damages* for *torts* not committed with force, actual or implied, or having been occasioned by force, where the matter affected was not tangible, or the injury was not immediate, but consequential; or where the interest in the property was only in reversion; in all which cases trespass is not sustainable. Torts of this nature are to the absolute or relative rights of *persons* or to *personal* property in possession or reversion, or to *real* property corporeal or incorporeal in possession or reversion. These injuries may be either by *non-feasance*, or the omission of some act which the defendant ought to perform; or by *misfeasance*, being the improper performance of some act which

(1) Chitty on Pleading, Greening's edition, vol. 1, p. 148.

might lawfully be done; or by *malfeasance*, the doing what the defendant ought not to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some express or implied contract between them."

Besides the personal actions and the action of ejectment, there are also three other actions (1), "writ of right of dower," "writ of dower unde nihil habet," and "quare impedit" (2); the two former relating to certain claims of dower, and the latter to the case where the right of presentation to a benefice is obstructed.

If I have not quite wearied you on this subject, I should wish to conclude with two or three examples of what are called the common indebitatus counts, and in each of which "debt" or "promises" would lie.

Suppose, then, the contract between them not being under seal, that there is due and payable from A. to B., in full, a 100*l.*

For work done by B. to A.'s order.

Or—For goods sold and delivered by B. to A.

Or—For money lent by B. to A.

Or—For money paid by B. to A.'s use, at his request.

(1) See 3 & 4 Wm. 4, c. 27, s. 36.

(2) See Stephen on the Principles of Pleading, 5th edit. p. 9, 10, 11.

Or—For money received by A. for the use of B., as to which A. has no other duty than to pay it over to B.

Or—For money found to be due and payable from A. to B. on an account stated between them.

These sums respectively being in arrear, and payable forthwith, or as it is put, "on request," for each of the above claims, "debt" or "promises" would indifferently lie. In "debt" the declaration would shortly describe the nature of the claim in each case, and state that A. was indebted to B. in the sum of 100*l.* in respect of it, which "*was to be paid* on request." In "promises" the declaration would state, in the same manner, that A. was indebted; but would then add, that in consideration of the premises A. "*promised* B. to pay to him the said sum of money on request." The declaration in each instance concluding with the breach of the duty or promise to pay the money.

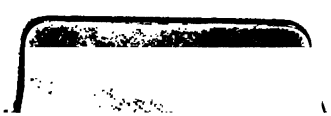
And "debt" or "promises" in such cases are technically distinguished as "debt" or "indebitatus assumpsit."

I have now given you some description of the progress of an action to issue, and of the different forms of action, and endeavoured to convey to you some general notion of the scope of the science of special pleading, and of the duties of the pleader; and I hope you have been able to perceive that beyond certain technicalities, which patience and industry will easily overcome, there lies a fair and

pleasant field for the exercise of ordinary good sense, discrimination and judgment; and that therefore you should be ready to discard that feeling of diffidence and aversion experienced by so many under the mistaken supposition that the difficulties which perplex them at the first outset will accompany them throughout their career.

THE END.

LONDON:
RAYNER AND HODGES, PRINTERS,
109, Fetter Lane, Fleet Street.



LETTERS

ON

SPECIAL PLEADING,

BEING AN

INTRODUCTION TO THE STUDY

OF THAT

BRANCH OF THE LAW.

Second Edition,

REVISED AND ENLARGED.

BY

JOSEPH PHILIPS, ESQ., M.A.,

OF THE INNER TEMPLE, SPECIAL PLEADER.

LONDON:

WILLIAM BENNING & CO., LAW BOOKSELLERS,

43, FLEET STREET.

1850.